

SIGNED.

Dated: February 9, 2012



James M. Marlar

James M. Marlar, Chief Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:

MMP 10180, LLC,

Debtor.

Chapter 11

No. 4:10-bk-38675-JMM

Adversary No. 4:11-ap-02173-JMM

MMP 10180, LLC,

Plaintiff,

v.

SPCP GROUP IV, LLC,

Defendant.

MEMORANDUM DECISION

Pending before the court is a motion to dismiss this adversary proceeding, filed by Defendant SPCP Group IV, LLC ("SPCP") (ECF No. 6). All parties have filed pleadings in connection therewith, and oral argument was held on February 6, 2012.

The court took the matter under advisement, and now rules.

THE CHAPTER 11 BACKGROUND

The Debtor filed for Chapter 11 relief on December 2, 2010. Its business is a "Pizzeria Uno" or "Loop Taste of Chicago" restaurant located at 10180 N. Oracle Road, Tucson, Arizona.

1 In its schedules, the Debtor listed the value of its real property at \$1,600,000, and the secured
2 debt against it at \$2,892,000 (Admin. ECF No. 24). That debt was broken down as:

3	4	1st mortgage	SPCP Group IV	\$1,600,000
5	6	2nd mortgage	U.S. Small Business Administration	1,152,000
7	8	3rd mortgage	Roger Bonus Revocable Trust	<u>140,000</u>
9	10			\$2,892,000

11 The Debtor filed a plan of reorganization, which was confirmed on September 26, 2011
12 (Admin. ECF No. 90).

13 In the plan, at Article XI, this court retained post-confirmation jurisdiction "to determine
14 any and all adversary proceedings . . . that have been or may be commenced." It also retained
15 continuing jurisdiction "to issue such orders as may be appropriate in aid of implementation
16 and execution of the plan, to the extent authorized by Section 1142 of the Bankruptcy Code."
17 And, "to hear and determine disputes or issues arising in connection with the interpretation,
18 implementation, or enforcement of the Plan, the Confirmation Order, any transactions or
19 payments contemplated thereby, any agreement, or other documents governing or relating to
20 any of the foregoing, or any settlement approved by the Bankruptcy Court." (Admin ECF
21 No. 50.)

22 After confirmation, the administrative side of the case appears, from the record, to have
23 proceeded smoothly. But, on November 29, 2011, a dispute erupted between the Debtor and
24 SPCP, which was filed as an adversary proceeding before this court.
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- Retention of existing lien(s);
- Interest reduction to 6%;
- Monthly principal and interest payments of \$8,394, based upon a 30-year amortization

(Admin. ECF No. 48 at 15). SPCP also held an unsecured debt related to a separate revolving credit line. This debt is approximately \$320,000 and placed in a class with other unsecured creditors, to be paid a pro-rata share of \$2,500 for 60 months. (Admin. ECF No. 48 at 16; see also Ex. 2 to Admin. ECF No. 48.)

As for the \$1,600,000 loan and other than the foregoing changes to the interest rate, monthly payment and amortization term, no other terms of the Promissory Note were altered. And, of course, if a plan was approved, the note would no longer be in default. 11 U.S.C. § 1123(a)(G,H). The plan would constitute the new agreement between the parties, Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 588 (9th Cir. 1993), and its terms would become the new binding contract. 11 U.S.C. § 1141(a).

D. SPCP's Objection

After the plan and disclosure statement were circulated to the Debtor's creditors, SPCP filed an objection to the plan on July 13, 2011 (Admin. ECF No. 70), and voted against it (Admin. ECF No. 69).

E. Confirmation Achieved

By September 23, 2011, however, the Debtor was able to reach consensus with its varied objecting classes, and had convinced SPCP to withdraw its objection (Admin. ECF No. 88). As part of that compromise, the Debtor had been able to line up new financing in order to pay about \$94,423.07 in past due real estate taxes. This payment benefitted not only the Debtor,

1 but also SPCP, because a tax lien senior to that of SPCP was removed (although replaced by a
2 priming lien), thereby enhancing SPCP's collateral position (Admin. ECF Nos. 88 and 92) in
3 that the new lien bore significantly less interest to that of the State, and because it allowed the
4 new debt to be paid in reasonable installments.

5 With this and other hurdles overcome, the court was able to sign and docket its order
6 confirming the plan on September 26, 2011 (Admin. ECF No. 90). The confirmation order had
7 two attachments that discussed in some way, the treatment of SPCP's secured class:
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9 **Exhibit A (Admin. ECF No. 90)**

- 10 • The secured lien amount was agreed to be \$1,315,000;
- 11 • Monthly principal and interest payments were to be \$8,394;
- 12 • 30-year amortization;
- 13 • First payment due on October 1, 2011;
- 14 • Interest rate of 6.5950% per annum;
- 15 • Balloon payment, September 1, 2015;
- 16 • Unsecured claim of \$611,151.88; and
- 17 • "Except as expressly set forth herein, the SPCP Group IV, L.L.C. Loan
18 Documents, terms, conditions and covenants shall remain in full force and effect
19 and are incorporated herein."

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21 **Exhibit B (Admin. ECF No. 90)**

- 22 • The language mirrored that of Exhibit A, but added a provision that Debtor's
23 monthly bank statements were to be provided to SPCP.
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25 No appeal was taken of the confirmation order, and it became final 14 days after the
26 order was entered on the docket. FED. R. BANKR. P. 8002.
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THE INSTANT CONTROVERSY

A. Jurisdiction

The dispute before the court is strictly about a disagreement over the time periods governing when payments under the plan are due. This is clearly a question of bankruptcy law, involving plan interpretation issues, and the type of matter exclusively reserved to the federal bankruptcy court (as a unit of the district court) for resolution. This is a core proceeding, as it involves an issue over the interpretation of a confirmed plan's provisions, a plan which arose solely because it is a Title 11 remedy. 28 U.S.C. §§ 157(a), (b); 1334. Because the dispute is a core proceeding, this court has the jurisdiction to decide it.

B. Issues

The only issues to be decided by the court, in the final analysis, are:

1. Were the Debtor's payments, under the plan, timely made; and
2. If not, can a remedy be fashioned to continue to implement the plan without irrevocably damaging either the Debtor, SPCP or the plan's other constituents and creditors.

Although the issues have been framed and argued, procedurally, in the context of a motion to dismiss complaint under FED. R. CIV. P. 12(b) (made applicable to bankruptcy proceedings by FED. R. BANKR. P. 7012), the parties noted, at oral argument, that a decision on the substantive issues would most likely resolve the entire dispute.

To the extent that the motion to dismiss is based upon lack of subject matter jurisdiction, the motion must be DENIED.

In that spirit, then, the court will attempt to cut the Gordian Knot.

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2 **THE FACTS INTERTWINED WITH THE LAW**
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4 Since the entire case rests of whether payments by the Debtor were timely made or not,
5 all of the significant facts can be gleaned from the pleadings filed by the parties, and by the
6 application of legal principles.

7 The order confirming the plan was entered and docketed on September 26, 2011.
8 According to the plan, its "effective date" (the day by which the Debtor is to begin
9 implementing the plan¹) was defined as "the first day on which the Plan becomes effective in
10 accordance with its terms and the Confirmation Order." (Admin. ECF No. 50 at 6.)

11 That language is not a model of clarity. It gave no specific date in the future, it did not
12 say anything about the end of an appeal period, or provide any other specific information about
13 when the plan comes "effective." So, to assist it, the court turns to FED. R. BANKR. P. 3020(e),
14 which can at least pinpoint the earliest date by which a plan can become effective. That rule
15 states:

16 An order confirming a plan is stayed until the expiration of 14
17 days after the entry of the order, unless the court orders otherwise.
18

19 Here, there is no court order which would "otherwise" shorten this mandatory waiting period.
20 There is no legal restriction to doing so, but the parties did not ask, and the court did not
21 "otherwise order" a waiver or shortening of the 14-day period. FED. R. BANKR. P. 9006(c).
22 Thus, it appears that the earliest effective date for this plan would be Monday, October 10,
23 2011. But there is another hitch--that day was a federal holiday, Columbus Day. So the
24 effective date was pushed out to October 11, 2011. FED. R. BANKR. P. 9006.
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26 ¹ The Bankruptcy Code does not define the "effective date" of the plan. The effective date is
27 usually understood as the "date on which the provisions of a plan of reorganization become
28 effective and binding on the parties." Kenneth K. Klee, *Adjusting Chapter 11: Fine Tuning the
Plan Process*, 69 Am. Bankr. L.J. 551, 560–61 (1995); accord In re Hoopai, 581 F.3d 1090,
1101 (9th Cir. 2009).

1 Because of this uncertainty in the earliest date that the Debtor could begin implementing
2 its plan and making payments thereunder, because no party provided language "ordering
3 otherwise," and because of the required, mandated 14-day stay on confirmed plans under Rule
4 3020(e), it was legally impossible for the Debtor to have met the plan-promised October 1,
5 2011 payment. This was obviously an oversight by all affected parties, but it nonetheless has a
6 legal consequence. Although the parties had an expectation of an October 1 payment, the law
7 trumped their expectation and instead imposed a 14-day waiting period. Since they did not
8 address that point of law, it took precedence over their expectation.

9 Therefore, considering that the plan's October 1, 2011 payment was one which the
10 Debtor was legally prohibited from making due to a stay that was imposed by operation of law
11 (FED. R. BANKR. P. 3020(e)), and because no other terms of the plan applied, the court has no
12 choice but to fall back on the plan language which does apply, to wit:

13 Except as expressly set forth herein, the SPCP Group IV, L.L.C.
14 Loan Documents, terms, conditions and covenants shall remain in
15 full force and effect and are incorporated herein.

16 (Admin. ECF No. 90, Ex. A.)

17 The only "loan documents" that are relevant are the Promissory Note and Deed of Trust.
18 The Note thus provides the court with an alternate payment date, the 17th of the month, plus a
19 10-day grace period, which would give the Debtor to and through October 27, 2011 within
20 which to make the first payment. After the first payment, nothing else in the parties' agreed
21 plan requires future payments to be made on the first day of each month. After the first
22 payment, all subsequent payment dates were governed by the Note's terms, the 17th, plus a 10-
23 day grace period.

24 The Debtor's first check was dated October 24, 2011. Allowing three days for mailing
25 (FED. R. BANKR. P. 9006(f)), SPCP was deemed to have received it, timely, on October 27,
26 2011. This payment, then, was timely.

27 The Debtor's November check was dated and mailed ahead of schedule, on October 29,
28 2011. Its December payment was also mailed and dated early, December 1, 2011. No issues

1 have been presented as to these later payments. According to Debtor's counsel, each check
2 cleared and was accepted by SPCP. Nothing contradicts this chronology.

3 SPCP maintains that the first payment was in default, not having been made on
4 October 1, 2011. It therefore began a trustee's sale on or about October 31, 2011.

5 However, due to the legal and practical aspects of the plan's "effective date" issues,
6 SPCP's actions in beginning a trustee's sale were premature. This is precisely because, as
7 noted, there had been no default when the trustee's sale was commenced, due to the intervention
8 of the law as to stays and timing.

9 The court finds and concludes that the October, November and December, 2011
10 payments, made by the Debtor to SPCP, were timely. No defaults or responsibility for late fee
11 payments were triggered. There being no default, no trustee's sale should have been
12 commenced.

13 No other issues are before the court. A preliminary injunction prohibiting SPCP from
14 continuing forward with its trustee's sale will be entered. (Counsel for Debtor shall upload the
15 order.) All other issues raised by the parties are moot (i.e., address issues).

16 Should the parties desire to press forward with the case, SPCP should file an answer
17 within 20 days. If the parties choose to dismiss the case, they certainly may do so at their
18 convenience. If they desire another procedural route, they should either so stipulate or seek a
19 status hearing.

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21 DATED AND SIGNED ABOVE.

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23 COPIES to be sent by the Bankruptcy Noticing
24 Center ("BNC") to all parties to this adversary proceeding
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